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In The

# Supreme Court of the United States

October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, et al.,

*Appellants,*

v.

JEFFREY MAY, individually, et al.,

*Appellees.*

On Appeal from the United States Court of Appeals for the Third Circuit

## BRIEF OF AMICI CURIAE NEW JERSEY COUNCIL OF CHURCHES NEW JERSEY ASSOCIATION OF REFORM RABBIS NEW JERSEY-WEST HUDSON VALLEY COUNCIL OF THE UNION OF AMERICAN HEBREW CONGREGATIONS IN SUPPORT OF APPELLEES

DONALD L. DRAKEMAN
1401 Broad Street
Clifton, New Jersey 07015
201-773-6300
*Attorney for Amici Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

## QUESTION PRESENTED

Whether a New Jersey statute requiring public school teachers to "permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection" violates the establishment clause of the first amendment to the Constitution.

## SUMMARY OF ARGUMENT

Amici, New Jersey churches and synagogues, are the intended beneficiaries of this law designed to encourage school prayer. Amici reject as unconstitutional and improper this supposed "accommodation" which is instead a governmental usurpation of religious authority.

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## INTEREST OF AMICI CURIAE

Amici Curiae are three organizations that represent an extremely broad spectrum of Jewish and Christian clergy and laity. Members of Amici Curiae organizations include: the New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations and the New Jersey Association of Reform Rabbis, the principal associations of Reform Judaism congregations in New Jersey; and the New Jersey Council of Churches, the most diverse ecumenical Protestant organization in the State of New Jersey, which has the following members:

Presbyterian Church USA

Episcopal Church

United Methodist Church

United Church of Christ

Lutheran Church in America

American Baptist Churches of New Jersey

General Baptist Convention of New Jersey

Reformed Church in America

African Methodist Episcopal Church

African Methodist Episcopal Zion Church

Union American Methodist Episcopal Church

Christian Church

Christian Methodist Episcopal Church

The Salvation Army

Religious Society of Friends

These organizations regularly study and take positions on social and political issues, particularly ones dealing with the religious activity of governmental bodies. Since this case will significantly affect the relationship of church and state in New Jersey and across the nation, Amici have united in this brief to express their concern that this Court keep religion and government in proper balance.

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## ARGUMENT

Amici urge this Court to strike down New Jersey's "moment of silence" law as an unconstitutional establishment of religion. Rather than burden this Court with a repetition of the many compelling constitutional arguments in opposition to this law, Amici wish to express their special viewpoint as representatives of a vast spectrum of New Jersey's religious community about why our legislators' efforts to encourage school prayer are both improper and unconstitutional.

Amici are responsible, in many respects, for the prayers of a vast number of Protestant and Jewish children in New Jersey's public schools. Through the thousands of clergy and millions of laity associated with our member churches and synagogues, we are on the front-lines of the battle to instill religion and prayer in our children. New Jersey's legislature has sought to aid this effort by putting the weight of the public schools behind the act of prayer. We have spurned this help for one crucial reason—The power to encourage prayer is the power to control prayer. Today that power may ostensibly be used to help us; tomorrow, it may be turned against us.

The First Amendment's religion clauses must ensure that the government cannot exert control over religion—pro or con.

This need not result in a governmental hostility to religion, though, and the free exercise clause may even require the government to accommodate religious activity where it might otherwise be forbidden (military chaplains, for example). But this accommodation is only proper in response to a valid, indeed compelling, free exercise right. The claims of the free exercise clause may outweigh those of the establishment clause, but where there is no free exercise claim, there can be no accommodation of religion. Any attempted accommodation without a free exercise claim is an unconstitutional endorsement of religion.

This is not an "equal access" case in which children ask for the opportunity to pray while their classmates are free to choose other extracurricular activities. Although the legislators have tried to make this law appear student-initiated by using the words "*shall permit* students to observe a 1 minute period of silence," N.J.S.A. 18A:36-4, this contemplative moment will necessarily take place when students no longer have freedom of choice over their activities. They will be under the control and authority of their teachers. Accordingly, the "shall permit" language is a red herring since it would be ludicrous to suggest that school children really want peace and quiet but their teachers, absent this statute, would forbid the students' silence. The statute will inevitably create a mandatory official devotional moment at the opening of the school day.

This law cannot be divorced from a culture that saw decades of prescribed prayers at the very same time of the

school day and from the 17 predecessor bills since 1970 that have sought to bring religion back into New Jersey's public schools. By passing the religiously motivated moment of silence law, the government has become nothing more than a sponsor of one particular form of sectarian religious activity. This the Constitution forbids. See Drakeman, "Is New Jersey's Moment of Silence Law Constitutional?" 35 *Rutgers Law Review* 341 (1983).

Finally, Amici are profoundly troubled by the extraordinary, and misplaced, emphasis the legislators have placed on prayer as a panacea for society's ills. Amici will be the first to admit to the power of prayer, but the role of the legislature is not to serve as priest or prophet but to find concrete solutions to the plethora of social problems facing this State. To attempt to cure New Jersey's problems by introducing prayer into the schools is not only to misuse prayer by employing it as a means of social control, but also to disregard the depth of the social problems and the need for a tangible response to them.

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## CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit, holding the moment of silence law to be unconstitutional, should be affirmed.

Respectfully submitted,

DONALD L. DRAKEMAN
1401 Broad Street
Clifton, New Jersey 07015
201-773-6300
*Attorney for Amici Curiae*